APPENDIX

APPENDIX A

In the

United States Court of Appeals

For the Seventh Circuit

September Term, 1973 September Session, 1973

No. 73-1084

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

v.

CHARLES D. McCORKLE, JR.,

Defendant-Appellant.

Appeal from the United States District Court for the Northern District of Illinois, Eastern Division.
No. 72-CR-18
BERNARD M. DECKER, *Judge.*

Argued December 7, 1973 — Decided April 8, 1974

Before SWYGERT, *Chief Judge*, CASTLE, *Senior Circuit Judge*, and CAMPBELL, *Senior District Judge.**

SWYGERT, *Chief Judge.* Defendant Charles D. McCorkle, Jr. was convicted of wilfully failing to file federal income tax returns for 1965, 1966, and 1967 in violation of 26

*Senior District Judge William J. Campbell of the Northern District of Illinois is sitting by designation.

U.S.C. § 7203.[1] At trial it was stipulated that the defendant had substantial gross income in each of the three years at issue and that he was therefore required to file returns for those years. The evidence was uncontradicted that defendant filed no tax returns for the years 1965, 1966, and 1967. Accordingly, the sole issue before the jury was whether defendant's failure to file was wilful.

The defendant raises several issues for our review, the most important of which are: whether the trial court erred in limiting defendant's cross-examination of the Government's witnesses, two Internal Revenue agents; and whether the court properly instructed the jury on the issue of wilfulness. The defendant charges error in both respects. We agree.[2]

I

In an effort to prove defendant's wilful failure to file, the Government presented testimony from two Internal Revenue Service agents, Joseph Powers, an Internal Reve-

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[1] Section 7203 provides:

> Any person required under this title to pay any estimated tax or tax, or required by this title or by regulations made under authority thereof to make a return (other than a return required under authority of section 6015), keep any records, or supply any information, who willfully fails to pay such estimated tax or tax, make such return, keep such records, or supply such information, at the time or times required by law or regulations, shall, in addition to other penalties provided by law, be guilty of a misdemeanor and, upon conviction thereof, shall be fined not more than $10,000, or imprisoned not more than 1 year, or both, together with the costs of prosecution.

[2] We find defendant's contentions with respect to his motion to suppress certain statements made to agent Powers to be without merit. *United States* v. *Lehman*, 468 F.2d 93 (7th Cir. 1972). In addition, in view of our holding we need not reach the remaining issues presented by the defendant.

nue officer, and Paul Neuhauser, a special agent of the Internal Revenue Service. Both agents testified about statements made by the defendant during the course of conversations conducted by the agents with the defendant during 1969 prior to indictment. On cross-examination the trial court denied defendant's counsel the opportunity to question the agents as to additional statements defendant made to them which allegedly tended to show defendant's lack of wilfulness. The Government contends that the trial court properly limited the scope of the cross-examination in that the testimony of the Internal Revenue Service agents as to these additional statements defendant made to them was inadmissible hearsay. The Government also argues that the testimony sought to be elicited was irrelevant.

Admittedly the statements of defendant testified to by the agents on direct examination were hearsay, but were allowable under the recognized hearsay exception of statements against interest. With respect to the statements by defendant sought to be brought out on cross-examination, the Government properly identifies them as self-serving hearsay declarations. Nonetheless, the principle of verbal completeness prescribes that the defendant may bring out on cross-examination that testimony which might qualify, explain, limit or contradict the portion offered by the Government on direct examination. As the Sixth Circuit stated in *Banning* v. *United States,* 130 F.2d 330, 338 (6th Cir. 1942):

> It frequently happens that on direct examination of a witness as to a conversation, transaction or other matter, counsel will bring out only such parts as are favorable to the party he represents. When this occurs, it is the right of the cross-examiner to put the trial court in possession of the full details respecting the matters within the scope of the direct examination.

Having utilized hearsay statements on direct with respect to the conversations between the defendant and the agents, the Government cannot object to the usage of testimony on cross-examination that brings out the whole of those conversations simply due to the hearsay nature of that testimony.

The Government seeks support from our decisions in *United States* v. *Seyfried*, 435 F.2d 696 (7th Cir. 1970), and *United States* v. *Lehman*, 468 F.2d 93 (7th Cir. 1972). We find those decisions inapposite in resolving the instant appeal, for in neither decision did we confront the problem of verbal completeness. In *Seyfried* we held that the portion of a confession by a third party which exonerated the defendant of any criminal activity was inadmissible due to the fact that the exonerating statement was not a declaration against the third party's penal interest. In *Lehman* we rejected the defendant's attempt to elicit through his witness hearsay statements made to the witness hours after the defendant's confession to Revenue agents; we held that the hearsay declarations did not come within the res gestae exception to the hearsay rule.

The Government urges that the proffered testimony sought to be produced on cross-examination was irrelevant to the issue of wilfulness. Specifically the Government argues that the proffered testimony was not relevant to a showing of defendant's state of mind at the time he failed to file. The Government's view of relevancy is unduly restrictive for it cannot be gainsaid that a defendant's subsequent conduct and statements may tend to show an innocent state of mind at a prior time. Our review of the proffered testimony indicates that it is highly relevant to the determination of defendant's state of mind at the time the returns were due and that the trial court erred in excluding it.

II

The defendant claims that the trial court erroneously instructed the jury on the meaning of wilfulness as utilized in section 7203. It is asserted that the trial court's error emanates from an improper distinction between the meaning of wilfully as used in the tax felony statutes, *e.g.,* 26 U.S.C. § 7201, and as it is used in the tax misdemeanor statutes such as section 7203. Any semantic confusion which previously existed with respect to the meaning of wilfully has been eliminated by the Supreme Court's decision in *United States* v. *Bishop,* 412 U.S. 346 (1973). In *Bishop* it is made clear that there is no distinction in the meaning of "wilfully" as utilized in both tax felony and tax misdemeanor statutes. Accordingly, as used in section 7203 wilfully contemplates "a voluntary, intentional violation of a known legal duty." *United States* v. *Bishop, supra* at 360. The Court in *Bishop,* adhering to its longstanding interpretation of "wilfully" annunciated in *United States* v. *Murdock,* 290 U.S. 389, 398 (1933) and *Spies* v. *United States,* 317 U.S. 492, 498 (1943), noted that proof of wilfulness requires a demonstration of " 'bad faith or evil intent" or " 'evil motive and want of justification in view of all the financial circumstances of the taxpayer.' " 412 U.S. 360.

The asserted erroneous trial court instructions on wilfulness were as follows:

> You are further instructed that the wilfulness which the Government must prove beyond a reasonable doubt does not require the Government to prove that the defendant had a purpose to evade a tax or to defraud the Government. For example, one might honestly plan and intend to pay the tax revenues due the Government at some future time subsequent to the required filing date and, hence, have no intent to

defraud the Government of taxes, but if one intentionally fails to file a return at the time when required by the law with full knowledge that he was required to do so, and it is immaterial whether or not at that time he could or could not pay the tax that was due, I instruct you that this is all that is necessary for the Government to prove to establish the offense of a willful failure to file the tax returns. In other words, lady and gentlemen, the intent to report income and pay the tax sometime in the future is not a defense to the charge of willfully failing to file tax returns. The willful failure to make a return is made an offense under the laws of the United States, without regard to the existence of a tax liability and punctuality is important to the fiscal system and sanctions are imposed by the law to assure punctual as well as faithful performance of one's duties.

• • •

Now, the word "wilful" has a number of different meanings depending upon the context in which it is used. As used in this statute—and I am talking now about United States Code, Title 26, Section 7203, the word "wilful" means voluntary, purposeful, deliberate and intentional, as distinguished from accidental, inadvertent or negligent.

The failure to act is willfully done if done voluntarily and purposefully and with a specific intent to fail to do what the law requires to be done; that is to say, with a bad purpose to disobey and disregard the law. I charge you that the only bad purpose necessary for the Government to prove in this case is the deliberate intention not to file returns, which the defendant knew he was required to file at the time that he was required to file them.

The law does require proof of specific intent before the defendant can be convicted. Now, "specific intent" means more than general intent to commit the act; to establish specific intent the Government must prove, beyond a reasonable doubt, that Charles Mc-

> Corkle knowingly did an act which the law forbids, purposefully intending to violate the law and knowing that such act would violate the law. Such intent may be determined by you from all of the evidence which has been submitted in this case.

The above instructions required a mere finding of an intention not to file returns without more. The court explicitly directed the jury that it need not concern itself with whether the defendant intended to defraud the Government. Moreover, the court's instructions had the effect of eliminating justifiable excuse as a consideration in resolving the issue of wilfulness. The instructions failed to properly charge the jury on the element of wilfulness.[a]

The Government contends that certain of the other instruction given correctly described the element of wilfulness and that consequently the charge taken as a whole was proper. We cannot agree. It is not enough to say that the total charge is rendered proper because the jury may choose to follow the correct statement of the law rather than the incorrect statement of law. Having uttered the incorrect instructions on the element of wilfulness, no additional instruction on wilfulness, albeit correct, could neutralize the misstatement. As the Fifth Circuit has stated: "Instructions to the jury must be consistent and not misleading. The fact that one instruction is correct does not cure error in giving another inconsistent one." *Mann* v. *United States*, 319 F.2d 404, 410 (5th Cir. 1963).

The judgment of conviction is reversed and the case is remanded for a new trial.

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[a] We are aware of course that the trial judge did not have the benefit of *United States* v. *Bishop* at the time the instructions were given.

CASTLE, *Senior Circuit Judge*. I respectfully dissent. The trial court properly limited the cross-examination of the Internal Revenue Service agents to exclude from evidence certain self-serving statements made by the defendant, McCorkle, to the agents. Such statements were inadmissible hearsay unprotected by any exception to that evidentiary rule (unlike McCorkle's admissions to which the agents testified on direct examination). The doctrine of verbal completeness does not have currency in this application, where the self-serving statements are clearly unrelated to the admissions so that it is highly unlikely that the former was ever intended to qualify or to explain the latter. *Cf., United States* v. *Lehman*, 468 F.2d 93 (7th Cir. 1972). Moreover, the testimony sought to be elicited was irrelevant to a showing of McCorkle's state of mind at the time he chose not to file his tax returns. It is most doubtful that a suspect's subsequent statements to government agents would accurately reflect an innocent state of mind at a prior time. It seems more probable to expect that such statements would reflect a self-serving, exculpatory purpose.

Moreover, I cannot agree that the trial court erroneously instructed the jury on the meaning of wilfulness as expressed in 26 U.S.C. § 7203. Wilfulness is satisfied only by a finding that the taxpayer committed "a voluntary, intentional violation of a known legal duty." *United States* v. *Bishop*, 412 U.S. 346, 360 (1973). The Supreme Court explicitly established in *Bishop* a standard of *scienter* for conviction under the statute, as the majority pointed out. The instructions of the trial court fully comported with the Supreme Court's interpretation of the statute. The trial court stated to the jury:

> "the word 'wilful' means voluntary, purposeful, deliberate and intentional, as distinguished from accidental, inadvertent or negligent."

The court further emphasized that the *scienter* requirement could only be met by a finding of a deliberate intention not to file tax returns. The trial court thus properly focused on the pertinent legal duty involved in this case in defining "bad purpose." As the court correctly noted, an intent to evade tax or to defraud the government is legally irrelevant to a finding of the intentional violation present in this case, as is a justification based on either inability to pay taxes or an intention to report and pay taxes some time in the future.

Respectfully, I would affirm the judgment of the trial court.

A true Copy:

Teste:

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Clerk of the United States Court of Appeals for the Seventh Circuit.

APPENDIX B

In the

United States Court of Appeals

For the Seventh Circuit

No. 73-1084

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

v.

CHARLES D. MCCORKLE, JR.,

Defendant-Appellant.

Appeal from the United States District Court for the Northern District of Illinois, Eastern Division.
No. 72 CR 18
BERNARD M. DECKER, *Judge.*

Argued *en banc* December 10, 1974 —
Decided February 24, 1975

Before SWYGERT, *Chief Judge,* CASTLE, *Senior Circuit Judge,* FAIRCHILD, CUMMINGS, PELL, STEVENS, SPRECHER and TONE, *Circuit Judges.*

CASTLE, *Senior Circuit Judge.* Defendant Charles D. McCorkle, Jr. was convicted by a jury of willfully failing to file federal income tax returns for 1965, 1966 and 1967

in violation of 26 U.S.C. § 7203.[1] The sole issue before the jury was whether McCorkle's failure to file was willful.

On appeal, a panel of this court reversed McCorkle's conviction, holding that the trial court incorrectly instructed the jury on the issue of willfulness and erred in limiting McCorkle's cross-examination of two Internal Revenue Service agents. Subsequently, a majority of the active judges on this court voted to rehear the case en banc. After carefully reviewing McCorkle's contentions, we affirm his conviction.

I.

McCorkle argues that in order to find that he willfully failed to file his tax returns, *United States* v. *Bishop*, 412 U.S. 346, 361 (1973) requires an intent to defraud the Government or other similar "bad purpose or evil motive." He asserts, therefore, that the trial court's instructions [2] directing the jury that it need not be concerned with

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[1] That section provides:

> Any person required under this title to pay an estimated tax or tax, required by this title or by regulations made under authority thereof to make a return (other than a return required under authority of section 6015) keep any records, or supply any information, who willfully fails to pay such estimated tax or tax, make such return, keep such records, or supply such information, at the time or times required by law or regulations, shall, in addition to other penalties provided by law, be guilty of a misdemeanor and, upon conviction thereof, shall be fined not more than $10,000, or imprisoned not more than 1 year, or both, together with the costs of prosecution.

[2] The instructions on the element of willfulness were as follows:

> You are further instructed that the wilfulness which the Government must prove beyond a reasonable doubt does not require the Government to prove that defendant had a purpose to evade a tax or to defraud the Government. For example, one might honestly plan and intend to pay the tax revenues due the Government at some future time subsequent to the

whether the defendant intended to evade taxes or defraud

(footnote continued)

required filing date and, hence, have no intent to defraud the Government of taxes, but if one intentionally fails to file a return at the time when required by the law with full knowledge that he was required to do so, and it is immaterial whether or not at that time he could or could not pay the tax that was due, I instruct you that this all that is necessary for the Government to prove to establish the offense of a willful failure to file the tax returns. In other words, lady and gentlemen, the intent to report income and pay the tax sometime in the future is not a defense to the charge of willfully failing to file tax returns. The willful failure to make a return is made an offense under the laws of the United States, without regard to the existence of a tax liability and punctuality is important to the fiscal system and sanctions are imposed by the law to assure punctual as well as faithful performance of one's duties.

Now, the word "wilful" has a number of different meanings depending upon the context in which it is used. As used in this statute—and I am talking now about United States Code, Title 26, Section 7203, the word "wilful" means voluntary, purposeful, deliberate and intentional, as distinguished from accidental, inadvertent or negligent.

The failure to act is willfully done if done voluntarily and purposefully and with a specific intent to fail to do what the law requires to be done; that is to say, with a bad purpose to disobey and disregard the law. I charge you that the only bad purpose necessary for the Government to prove in this case is the deliberate intention not to file returns, which the defendant knew he was required to file at the time that he was required to file them.

The law does require proof of specific intent before the defendant can be convicted. Now, "specific intent" means more than general intent to commit the act; to establish specific intent the Government must prove, beyond a reasonable doubt, that Charles McCorkle knowingly did an act which the law forbids, purposefully intending to violate the law and knowing that such act would violate the law. Such intent may be determined by you from all of the evidence which has been submitted in this case.

the Government precluded the jury from determining that his failure to file was not willful.

Prior to the Supreme Court's decision in *Bishop*, this court was confronted with the same argument as is presented here in *United States* v. *Matosky*, 421 F.2d 410 (7th Cir.), *cert. denied* 398 U.S. 904 (1970). In finding no error in the instructions on willfulness in that case, we held that:

> [T]he defendant's motive need not be restricted to an intent to defraud the Government in order for there to a violation of § 7203. Rather, the Government has proven its case when it has established beyond a reasonable doubt: that the defendant was required to file a return; that he knew that he was so required; and that he willfully or purposefully, as distinguished from inadvertently, negligently, or mistakenly, failed to file such a return. His reasons for failing to so file are irrelevant under § 7203, so long as the above facts are shown. *Id.* at 413 (Footnote omitted).

Thus, *Matosky* established that in order for the violation to be willful, the government need only prove a deliberate intention not to file returns which the defendant knew should be filed. Although *Bishop* disapproved our statement that the meaning of willfulness under the tax felony statutes would differ from its meaning under such tax misdemeanor statutes as § 7203, we believe the definition of willfulness enunciated in *Matosky* complies with the uniform meaning adopted by the Court in *Bishop*.

In *Bishop*, the Court held that "willfully" has the same meaning in both tax misdemeanor and tax felony statutes. The Court stated that the word "willfully" in these statutes "generally connotes a voluntary, intentional violation of a known legal duty," 412 U.S. at 360, and went on to rule that "we therefore shall continue to require, in both tax felonies and tax misdemeanors that must be done 'willfully,' the bad purpose or evil motive described in [*United States* v. *Murdock*, 290 U.S. 389 (1933)]." 412 U.S. at 361.

Contrary to the defendant's contentions, we believe that the Court employed the terms "bad purpose" and "evil motive" as a convenient method of referring to the longer definition of "willfully" as a "voluntary, intentional violation of a known legal duty," and not as engrafting an intent to defraud requirement or other similar evil purpose on that definition. Examination of the bad purpose or evil motive described in *Murdock* supports this conclusion.

The defendant in *Murdock* refused to supply information concerning his tax liability to federal revenue officials, fearing that such information would lead to prosecution under state law. Subsequently, the defendant was prosecuted for willfully failing to supply information under a statutory predecessor to § 7203. His defense was that he relied in good faith on his privilege against self-incrimination, and that therefore his refusal to supply the information requested could not be termed "willful." The trial court, in its charge to the jury, stated that it believed the defendant to be guilty.

The Supreme Court, in affirming the appellate court's reversal of the defendant's conviction, held that the trial court judge had improperly expressed his opinion that the defendant was guilty. The Court arrived at this result because it first concluded that to find that the defendant willfully violated the statute, it must be found that the defendant acted not only voluntarily, but also with "bad faith or evil intent." 290 U.S. at 398. Then, because it was not undisputed or admitted that "defendant's assertion of the privilege was so unreasonable and ill founded as to exhibit bad faith and establish willful wrongdoing," 290 U.S. at 396, the Court found that the trial court's comment had invaded the province of the jury. The implica-

tion of *Murdock*, therefore, is that had it been undisputed that the defendant knew that his reliance on the privilege was invalid, the trial court's comment would not have constituted error, and the conviction, without any further showing by the government, would have been upheld. Thus, the evil motive described in *Murdock* that would have satisfied the requirement of willfulness would have been the defendant's voluntary refusal to supply information, knowing that such refusal was wrongful.

Cases decided after *Bishop* have also interpreted that decision to mean that willfulness only requires an intentional violation of a known legal duty. *United States* v. *Hawk*, 497 F.2d 365 (9th Cir.), *cert. denied* 43 U.S.L.W. 3195 (U.S. Oct. 15, 1974); *United States* v. *Klee*, 494 F.2d 394 (9th Cir.), *cert. denied* 43 U.S.L.W. 3194 (U.S. Oct. 15, 1974); *United States* v. *Smith*, 493 F.2d 906 (5th Cir. 1974) (dictum). Thus, in *United States* v. *Hawk*, *supra*, at 368, the court found that the thrust of *Murdock* was that the requirement of willfulness is satisfied by proof that the act was done voluntarily and with knowledge that it was wrongful, and concluded that the terms bad purpose and evil motive are merely "convenient shorthand expression[s]" for the required elements of proof. Consequently, we reject the argument that intent to defraud is essential to prove that a violation is willful, and conclude that *Bishop* did not alter the definition of willful as set forth in *Matosky*.

Examination of the instructions in this case shows that in three instances the trial court correctly charged the jury that willfulness requires both an intentional failure to file, and knowledge by the defendant that he was under

a legal obligation to do so.[3] The defendant's contention that other statements in the court's charge might have misled the jury is without merit when the statements are considered in context and in light of the proper instructions that were given.

Finally, McCorkle argues that the instructions had the effect of eliminating justifiable excuse as a consideration in resolving the issue of willfulness. However, as we noted in *Matosky, supra,* at 413, only an inadvertent failure to file or "a bona fide misunderstanding as to [defendant's] . . . duty to make a return" would constitute "justifiable excuses." Since the instructions required the jury to find an intentional violation of a known legal duty, it would have been essential for the jury to conclude that McCorkle's conduct was unjustified. *United States* v. *Kaczmarek,* 490 F.2d 1031 (7th Cir. 1974). We find the trial court's instructions to be proper.

II.

McCorkle next claims that the trial court erroneously limited his cross-examination of two Internal Revenue

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[3] The instructions provided:

1) . . . if one intentionally fails to file a return at the time when required by law with full knowledge that he was required to do so . . . is all that is necessary for the Government to prove. . . .

2) The failure to act is willfully done if done voluntarily and purposefully and with a specific intent to fail to do what the law requires to be done; that is to say, with a bad purpose to disobey and disregard the law. I charge you that the only bad purpose necessary for the Government to prove in this case is the deliberate intention not to file returns, which the defendant knew he was required to file at the time that he was required to file them.

3) . . . the Government must prove beyond a reasonable doubt that Charles McCorkle knowingly did an act which the law forbids, purposefully intending to violate the law and knowing that such act would violate the law.

Service agents by excluding testimony concerning portions of conversations between McCorkle and the two agents after admitting testimony concerning other parts of the conversations during direct examination of the agents. The officers testified on direct examination that McCorkle admitted his failure to file his federal tax returns for the decade 1957-1967 and that he also recalled being advised that he could file his returns without payment or with only partial payment of the tax due. McCorkle further admitted to the agents that copies of purported tax returns for 1959-1960 furnished to a savings and loan association were fictitious, and that amounts representing estimated tax payments supplied to his accountant to present the appearance of diligent tax filing, were also fictitious.

At trial, McCorkle offered to prove that he also told the agents during these conversations that (1) he failed to file because he did not have the money to pay the tax due; (2) he did not file because of the possible criminal consequences arising from his failure to file earlier returns; (3) he did not file because he had been contemplating suicide; (4) he did not file because he feared the government, on learning of his tax liability, would place liens on his property and jeopardize his business; (5) he was involved in a divorce suit with his wife at the time of the investigation and the returns would have been voluntarily filed when the divorce was final; (6) he timely filed all employer's returns; (7) he offered to cooperate with the agents; (8) he offered to pay his civil liabilities; and (9) he kept accurate records of supplemental income, which would have been properly included on his returns.

The statements of McCorkle testified to by the revenue agents on direct examination are hearsay, but are receivable against him as admissions of a party opponent. IV J. WIGMORE, EVIDENCE § 1048 (Chadbourn rev. 1972). The hearsay statements which McCorkle sought to bring out on cross-examination, however, are properly characterized as self-serving, and are generally not admissible. IV J.

WIGMORE, *supra*, at 5; *see United States* v. *Seyfried*, 435 F.2d 696 (7th Cir.), *cert. denied* 402 U.S. 912 (1971). Nonetheless, McCorkle argues that the doctrine of verbal completeness permits him to bring out the whole of the conversations.

The right of a party to offer into evidence the remaining portion of an utterance is, however, not absolute. Wigmore lists two corollaries which limit the exercise of the doctrine of verbal completeness:

> (a) No utterance irrelevant to the issue is receivable;
>
> (b) No more of the remainder of the utterance than concerns the same subject, and is explanatory of the first part, is receivable;
>
> . . . . VII J. WIGMORE, EVIDENCE § 2113, at 524 (3d ed. 1940) (Emphasis and citations omitted).[4]

Applying these corollaries, we find that the proffered testimony was properly excluded.

First, since we have ruled that proof of intent to defraud the government is not required to establish the willfulness necessary for conviction under § 7203, it is apparent that essentially all of the testimony which McCorkle sought to introduce was of no relevance to whether McCorkle intentionally failed to file returns knowing that he was legally obliged to do so. The only evidence which might have been relevant was the declaration by McCorkle that he did not have the funds to pay the tax due. That only would have been the case, however, if McCorkle believed that the returns could not be filed without a remittance, but the evidence was undisputed that McCorkle's

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[4] Wigmore also lists a third corollary which pertains to how the testimony is to be treated if admitted.

attorney advised him as early as 1963 that he could file returns without making tax payments at the same time.

Second, the doctrine of verbal completeness is not applicable here because McCorkle's self-serving declarations do not qualify or explain his admissions. McCorkle contends that the proffered testimony would fully explain his state of mind at the time the returns were due. However, while the excluded testimony might be probative of McCorkle's general state of mind, it does not explain or qualify the mental state relevant for conviction under § 7203. Thus, the conversations at issue resemble the report in *Gencarella* v. *Fyfe,* 171 F.2d 419, 422 (1st Cir. 1948), where the court, in admitting into evidence only portions of a police report, dismissed an argument based on the doctrine of verbal completeness, observing that "the admissible and inadmissible parts of the report were readily severable from one another, and the separate parts have no bearing to explain or qualify each other." *See also United States* v. *Seyfried, supra,* at 698. Accordingly, we find no error in the trial court's exclusion of the proffered testimony.[5]

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[5] It is also claimed that the trial court improperly excluded the results of a polygraph examination of the defendant. As was the case with the testimony sought to be elicited on cross-examination, however, the offer of proof clearly demonstrates that the results of the test were irrelevant to a determination of the defendant's willfulness.

At oral argument, the defendant strenuously urged that the jury should be permitted to consider these extraneous matters in order to permit the jury to exercise its power as "conscience of the community," and to acquit the defendant even though there may be clear evidence of a criminal violation. The jury, of course, is free to exercise this prerogative, but only on facts relevant to the legal issues involved. *See* United States v. Burkhart, 501 F.2d 993, 996-997 (6th Cir. 1974).

III.

The defendant argues that the trial court erred by not suppressing his admission that he failed to file tax returns for 1966, 1967 and 1968 made at a June 20, 1969 meeting with revenue agent Joseph Powers, who was assigned to the Collection Division of the Internal Revenue Service. He asserts that IRS News Release No. 897,[a] issued October 3, 1967, which requires agents of the IRS Intelligence Division to warn taxpayers of their constitutional rights,

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[a] That release provides in part:

> In response to a number of inquiries the Internal Revenue Service today described its procedures for protecting the Constitutional rights of persons suspected of criminal tax fraud, during all phases of its investigations.
>
> Investigation of suspected criminal tax fraud is conducted by Special Agents of the IRS Intelligence Division. This function differs from the work of Revenue Agents and Tax Technicians who examine returns to determine the correct tax liability.
>
> Instructions issued to IRS Special Agents go beyond most legal requirements to assure that persons are advised of their Constitutional rights.
>
> On initial contact with a taxpayer, IRS Special Agents are instructed to produce their credentials and state: "As a special agent, I have the function of investigating the possibility of criminal tax fraud."
>
> If the potential criminal aspects of the matter are not resolved by preliminary inquiries and further investigation becomes necessary, the Special Agent is required to advise the taxpayer of his Constitutional rights to remain silent and to retain counsel.
>
> . . .
>
> IRS said although many Special Agents had in the past advised persons, not in custody, of their privilege to remain silent and retain counsel, the recently adopted procedures insure uniformity in protecting the Constitutional rights of all persons.

Reprinted in 7 CCH 1967 STAND. FED. TAX REP. ¶ 6832.

is applicable to Powers, and that Powers' failure to comply with the procedures provided for in the Release mandates suppression of his admission.[7]

Inquiry into the tax matters of the defendant began with an anonymous telephone call received at the Information Desk of the Intelligence Division of the IRS, alleging that McCorkle had not filed income tax returns for the years 1966-1968. The information was evaluated as having "no criminal potential," and the matter was referred to the Collection Division, which in turn assigned the case to agent Powers. Prior to meeting McCorkle, Powers knew that a routine check had disclosed that the files of the Collection Division did not contain McCorkle's returns. Powers then met with McCorkle on June 20, 1969, identified himself as a revenue officer, but did not warn the defendant of his constitutional rights. Later, McCorkle made his admission. After a second meeting at which McCorkle and his attorney were present, the matter was referred back to the Intelligence Division for criminal investigation.

The defendant argues that although the Collection Division conducts civil investigations, under the circumstances of this case Powers was acting as an agent of the Intelligence Division conducting a criminal inquiry. The defendant concedes that *United States* v. *Dickerson*, 413 F.2d 1111, 1117 (7th Cir. 1969), in which we prospectively required revenue agents to give *Miranda* warnings at the inception of the first contact with taxpayers after the case

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[7] The IRS Intelligence Division enforces the Criminal provisions of the Internal Revenue Code, while the Collection Division conducts civil actions to enforce collection of taxes. *See* 9 J. MERTENS, LAW OF INCOME TAXATION §§ 49.74-49.76 (rev. ed. 1971).

has been transferred to the Intelligence Division, is not applicable here because that case was decided after the meeting between Powers and McCorkle occurred. He urges, however, that even though *Dickerson* does not apply, Powers' failure to follow the IRS Release requires suppression of his admission. *Compare United States* v. *Leahey*, 434 F.2d 7 (1st Cir. 1970) and *United States* v. *Heffner*, 420 F.2d 809 (4th Cir. 1969) *with United States* v. *Lehman*, 468 F.2d 93, 104 (7th Cir.), *cert. denied* 409 U.S. 967 (1972). Assuming without deciding that a failure to follow the procedure outlined in the Release would have that consequence, the argument cannot succeed because the Release applied only to "[i]nvestigation of suspected criminal tax fraud . . . conducted by Special Agents of the IRS Intelligence Division," and thus, where the investigation is not criminal in nature, the Release, like the *Dickerson* rule (413 F.2d at 1116 n.10) does not require warnings.

The facts demonstrate that Powers was not conducting a criminal investigation in disguise. Powers testified that his duties as a revenue officer are to collect delinquent taxes and to pick up delinquent returns. Knowledge that McCorkle's returns were not in the Collection Division files would be essential to those duties, and does not indicate that he suspected criminal activity. The fact that the tip which led to the investigation originated in the Intelligence Division does not make Powers an agent of that Division, especially since the information was evaluated as having no criminal potential. *United States* v. *Robson*, 477 F.2d 13, 17 (9th Cir. 1973). Once the matter was referred to the Collection Division, the Intelligence Division relinquished all control over it, and Powers' investigation was completely independent. The existence of the possibility of criminal prosecution does not turn

Powers' inquiry into one to which the procedures required by the IRS News Release applies. *See United States* v. *Awerkamp*, 497 F.2d 832, 835 (7th Cir. 1974). Accordingly, we find that the trial court properly denied McCorkle's motion to suppress.

IV.

Lastly, McCorkle asserts that the trial court erred by permitting voir dire, in the absence of the jury, as to the relevancy of the testimony of his witness James Donnelly, and by subsequently concluding that the testimony was irrelevant and that the witness should not testify. In *United States* v. *Dellinger*, 472 F.2d 340, 408-409 (7th Cir. 1972), *cert. denied* 410 U.S. 970 (1973), we stated that departure from the normal procedure of allowing the witness to be questioned in ordinary course in the presence of the jury "should be directed only when an intention to engage in prejudicial conduct is clearly shown." The defendant, however, did not object to the procedure employed by the trial court, and the testimony elicited on voir dire was clearly not relevant. Consequently, there was at most harmless error. FED. R. CRIM. P. 52 (a).

The judgment of the district court is affirmed.

AFFIRMED.

SWYGERT, *Circuit Judge*, concurring. Reconsideration of the issue of wilfulness in light of the petition for rehearing, oral argument, a re-examination of the record, and Judge Castle's persuasive opinion has led me to the conclusion that my original view, expressed in the prior opinion in this case, which I authored, was in error. I am willing to agree that the scienter requirement of the statute does not encompass specific intent to defraud the Government, although I do maintain that a purposeful, volun-

tary failure to file a return does in a conceptual sense contain the latent intent to defraud the Government by not reporting income on which a tax may be assessed. A review of the instructions to the jury in this case now convinces me that the element of wilfulness was properly covered by the district judge and that the conviction in this case must therefore be affirmed.

A true Copy:

Teste:

.....

Clerk of the United States Court of Appeals for the Seventh Circuit.

APPENDIX C

UNITED STATES COURT OF APPEALS
For the Seventh Circuit
Chicago, Illinois 60604
April 1, 1975.
Before
Hon. Thomas E. Fairchild, Chief Judge
Hon. Latham Castle, Sr. Circuit Judge
Hon. Luther M. Swygert, Circuit Judge
Hon. Walter J. Cummings, Circuit Judge
Hon. Wilbur F. Pell, Jr., Circuit Judge
Hon. John Paul Stevens, Circuit Judge
Hon. Robert A. Sprecher, Circuit Judge
Hon. Philip W. Tone, Circuit Judge

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

No. 73-1084 v.

CHARLES D. McCORKLE, JR.,

Defendant-Appellant.

Appeal from the United States District Court for the Northern District of Illinois, Eastern Division.
(72 CR 18)

On consideration of the petition for rehearing and suggestion that this matter be reheard en banc, filed by counsel for the defendant-appellant in the above-entitled case, no judge in active service nor any member of the original panel having requested a vote thereon and no judge having voted to grant the suggestion, and all members of the panel having voted to deny a petition for rehearing,

It Is Ordered that the petition for a rehearing in the above-entitled cause be, and the same is hereby, Denied.

APPENDIX D

UNITED STATES COURT OF APPEALS
For The Eighth Circuit

No. 74-1759

United States of America,

Appellee,

v.

Berentje C. M. Pohlman,

Appellant.

Appeal from the United States District Court for the District of North Dakota.

Submitted: December 11, 1974.
Filed: February 11, 1975.

Before LAY and BRIGHT, *Circuit Judges*, and TALBOT SMITH, Senior District Judge.*

LAY, Circuit Judge.

Berentje C. M. Pohlman, a practicing attorney in Enderlin, North Dakota, was convicted by a jury of willfully failing to file her individual income tax returns for the years 1968, 1969 and 1970 in violation of 26 U.S.C. § 7203. Ms. Pohlman's basic defense was that she served as City Attorney of Enderlin in 1969 and as Mayor in 1970, and that she was so involved and busy in these positions, as well as with certain personal problems, that she did not

*TALBOT SMITH, Senior District Judge, Eastern District of Michigan, sitting by designation.

realize until late in 1970 that she had earned income sufficient to require filing. She maintained all her files and records and when visited by a field auditor of the Internal Revenue Service in early October 1972, she prepared returns for each of the years in question and filed them. On appeal she appears *pro se*, as she did in the trial court, raising several errors.[1] We need only discuss her attack on the instruction given by the trial court concerning the element of willfulness. We find this to have been reversible error and vacate the judgment of conviction and remand for a new trial.

Title 26 U.S.C. § 7203 makes it a misdemeanor[2] when a person "*willfully* fails . . . to make such return [as required by law] . . . at the time or times required by law . . ." (emphasis added). The court declined to give defen-

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[1] Ms. Pohlman contends the trial court erred in permitting Agent Engelmann to relate the conversation which occurred in her office on October 3, 1972, during which she admitted not having filed the returns since she was not informed of her constitutional right to remain silent prior to the conversation. She was not in custody, however, at the time of the conversation and we have frequently held that no warning need be given during a noncustodial investigation. *See United States* v. *MacLeod*, 436 F.2d 947, 950 (8th Cir.), *cert. denied*, 402 U.S. 907, *rehearing denied*, 402 U.S. 990 (1971); *United States* v. *Brevik*, 422 F.2d 449, 450 (8th Cir.), *cert. denied*, 398 U.S. 943 (1970); *United States* v. *Ping*, 407 F.2d 157 (8th Cir. 1969); *Muse* v. *United States*, 405 F.2d 40, 41 (8th Cir. 1968), *cert. denied*, 393 U.S. 1117 (1969); *Cohen* v. *United States*, 405 F.2d 34, 35-40 (8th Cir. 1968), *cert. denied*, 394 U.S. 943 (1969). *See also* cases cited at 405 F.2d 37 n.7.

[2] The defendant was fined a total of $1500.00 and placed on probation for two years.

dant's requested instruction on the meaning of willfulness [3] and, over her specific objection, gave the following:

> The specific intent of willfulness is an essential element of the crime of failure to file an income tax return. The word "willfully" used in connection with this offense means deliberately, and intentionally, and without justifiable excuse, or with the wrongful purpose of deliberately intending not to file a return which defendant knew she should have filed, in order to prevent the Government from knowing the extent of, and knowing the facts material to, the determination of her tax liability.
>
> Defendant's conduct is not "willful" if she acted through negligence, inadvertence, or mistake, or due to her good faith misunderstanding of the requirements of the law. It should be pointed out, however, that disagreement with the law is not a defense. It is the duty of all citizens to obey the law whether they agree with it or not.[4]

She contends that the court's instruction did not adequately define "willfully" as that word is used in § 7203. We agree. The controlling authorities are *United States* v. *Bishop,* 412 U.S. 346 (1973), and *United States* v. *Murdock,* 290 U.S. 389 (1933).

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[3] The requested instruction was:

> 2. Willfulness is an essential element of the crime of which defendant is charged in the indictment. An act is done "willfully" if done purposely with the specific intent to disregard the law, or to do that which the law forbids, and further means an act done with a bad purpose, the existence of specific wrongful intent, and evil motive at the time the crime charged was committed; mere laxity, careless disregard of duty imposed by law, or even gross negligence, unattended by "evil motive," is not probative of willfulness.

[4] This instruction is taken, with minor changes, from 2 Devitt & Blackmar, *Federal Jury Practice and Instruction* § 52.31 (1970).

In *Murdock,* the defendant had refused to supply information to the Internal Revenue Service concerning deductions claimed in his 1927 and 1928 income tax returns. He insisted that the Fifth Amendment permitted him to refuse the information since it would incriminate him under state law. He was charged with and convicted of willfully failing to supply the information. In upholding the reversal of his conviction, the Court discussed the meaning to be given the word "willfully" in tax crime statutes:

> The word often denotes an act which is intentional, or knowing, or voluntary, as distinguished from accidental. But when used in a criminal statute it generally means an act done with a bad purpose . . . .

290 U.S. at 394.

> Here we are concerned with a statute which denounces a willful failure to do various things thought to be requisite to a proper administration of the income tax law, and the Government, in the trial below, we think correctly, assumed that it carried the burden of showing more than a mere voluntary failure to supply information, with intent, in good faith, to exercise a privilege granted the witness by the Constitution. The respondent's refusal to answer was intentional and without legal justification, *but the jury might nevertheless find that it was not prompted by bad faith or evil intent, which the statute makes an element of the offense.*

Id. at 397-98 (emphasis added).

In *Bishop,* the Court was faced with the question of whether the word "willfully," as used in those several statutes defining misdemeanor tax crimes, had the same stringent meaning it had been accorded when used in the definition of a felony tax crime. The Court not only found that it did but went on to emphasize the necessity for determining the "bad purpose" articulated in *Murdock:*

> . . . The Court's consistent interpretation of the word "willfully" to require an element of *mens rea* implements the pervasive intent of Congress to construct penalties that separate the purposeful tax violator from the well-meaning, but easily confused, mass of taxpayers.
>
> Until Congress speaks otherwise, we therefore shall continue to require, in both tax felonies and tax misdemeanors that must be done "willfully," the bad purpose or evil motive described in *Murdock, supra.*

412 U.S. at 361.

Defendant's basic contention is that the court's instruction failed to sufficiently describe the requirement of wrongful intent and evil motive required under the law. Several cases have held both before and after *Bishop* that the specific words "bad purpose" or "evil motive" need not be used by the courts in defining the element of willfulness. *See* cases collected in *Cooley* v. *United States,* 501 F.2d 1249 (9th Cir. 1974), and *United States* v. *Hawk,* 497 F.2d 365 (9th Cir.), *cert. denied,* 95 S.Ct. 67 (1974). What is required, however, is that the instruction convey "the proper notion of specific intent in understandable terms." *United States* v. *Hawk, supra* at 369. As the Seventh Circuit observed in *United States* v. *Matosky,* 421 F. 2d 410, 412 (7th Cir.), *cert. denied,* 398 U.S. 904 (1970), "the only bad purpose or bad motive necessary for the government to prove is a deliberate intention not to file returns which the defendant knew ought to be filed." This court approved such an instruction under § 7203 in *Lumetta* v. *United States,* 362 F.2d 644 (8th Cir. 1966).[5]

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[5] The full instruction in *Lumetta,* however, was later disapproved in a post-*Bishop* case since it erroneously embodied *Murdock* language which allowed a definition of willfulness to include "careless or reckless disregard." *See United States* v. *Bengimina,* 499 F.2d 117 (8th Cir. 1974).

The basic question in the present case is whether the trial court sufficiently and accurately defined the specific intent required. Concededly there is no mention of "bad purpose" as used in *Lumetta* and other cases decided previously by this court. *See also United States* v. *MacLeod*, 436 F.2d 947, 950 (8th Cir.), *cert. denied*, 402 U.S. 907 (1971).

The art of instructing a jury in plain and understandable terms requires, on the part of the trial judge, an acute awareness of the extraordinary demands made upon him in the skill of communication. In many trial courts the practice varies as to whether or not the jury charge goes to the jury room,[6] but where under either procedure there lurk shortcomings or dangers in effectively communicating to the jury, the charge should always seek out explicit and clear language in layman's terms. Unfortunately, as has often been said, the trial court writes instructions in terms for the benefit of the appellate court than for the lay jury.

The questioned instruction does attempt to *imply* that "bad purpose" may be an element of the crime by excluding from the meaning of "willful" negligence, inadvertence or mistake or . . . good faith misunderstanding of the requirements of the law." The instruction mentions that willful does include the wrongful purpose of deliberately intending not to file a return when the defendant knew she should file. However, the court prefaces this meaning by saying that "willfully" also means doing something "deliberately and intentionally, and without

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[6] In this circuit, we have recently held that furnishing written instructions to the jury lies within the discretion of the trial court. *See, United States* v. *Johnson*, 466 F.2d 537 (8th Cir. 1972), *cert. denied*, 409 U.S. 1111 (1973).

justifiable excuse."[7] Yet early in *Murdock* the Supreme Court observed that one who acts deliberately and intentionally and without legal justification must still be found not guilty if he did not possess, *in addition,* a state of mind which manifested a bad purpose or evil motive to violate the law. *Murdock* at 397-98.

Here the defendant attempted to justify her failure to file her returns because of the pressing demands of her public and private life. There is no doubt that she did not have a legal justification for failing to comply with the law. The jury was told that if it found the defendant did not have a justifiable excuse for failing to file this alone would be sufficient to convict her. Herein lies the prejudice. Under the charge the jury could have believed the reason Ms. Pohlman gave for failing to file, a reason which negates *mens rea* if believed, and yet have found her guilty. Their verdict could have resulted from a belief that, although this was the reason, it was not justifiable under the law. As discussed, more is required to be culpable under the statute. The jury must find that her failure to file arose from a bad motive and evil intent to commit an illegal act, fully aware of her legal obligation to do otherwise.

Since bad purpose and evil motive are essential elements of willfulness under § 7203, we see no reason that the jury should be afforded the ambiguity of an instruction which possibly denotes otherwise. If these are essential elements of the misdemeanor the jury should be told so in plain and unambiguous terms. As this court reaffirmed in *United States* v. *Achtenberg,* 459 F.2d 91 (8th Cir.), *cert. denied,* 409 U.S. 932 (1972):

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[7] In setting this meaning off from the rest of the instruction the court uses the disjunctive "or".

> "Obviously, if the jury is to function effectively, it must be given a clear statement of each element which the Government must prove. The elements, as expressed in the statute, are hardly set forth with sufficient clarity to permit the jury to perform its duty intelligently. . . ."

Id. at 97, quoting from *Jackson* v. *United States,* 348 F.2d 772, 774 (D.C. Cir. 1965).[8]

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[8]A much preferable instruction is found in another recent Ninth Circuit case, *United States* v. *Klee,* 494 F.2d 394 (9th Cir. 1974):

> The term willfully used in the statute which I have read to you, that is, referring to one who willfully fails to make such a return, means voluntary, purposeful, deliberate and intentionally [sic], as distinguished from accidental, inadvertent, or negligent.
>
> Mere negligence, even gross negligence, is not sufficient to constitute willfulness under the criminal law.
>
> The failure to make a timely return is willful if the defendant's failure to act was voluntary and purposeful, and with the specific intent to fail to do what he knew the law requires to be done; that is to say, with a bad purpose or evil motive to disobey or disregard the law which requires to (sic) file a timely return which discloses to the government facts material to the determination of his tax liability.
>
> There is no necessity that the government prove that the defendant had an intention to defraud it, or to evade the payment of any taxes, for the defendant's failure to file to be willful under this provision of the law.
>
> On the other hand, the defendant's conduct is not willful if you find that he failed to file a return because of negligence, inadvertence, accident or reckless disregard for the requirements of the law, or due to his good faith misunderstanding of the requirements of the law.

494 F.2d at 395.

Judgment reversed and remanded for a new trial.[9]

A true copy.

Attest:

Clerk, U.S. Court Of Appeals, Eighth Circuit.

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[9]Although the defendant represented herself at the trial and in this court and was successful here, we strongly urge her to retain independent counsel in the event this matter is to be retried. The degree of personal involvement by a defendant-lawyer in a criminal proceeding makes it extremely difficult for that person to fairly and objectively evaluate the facts and legal issues. We are confident from the record presented that the defendant's attempt to represent herself before the jury materially prejudiced her case. The written briefs and oral presentation made by the defendant in the present case were disorganized, confusing and difficult for this court to follow. In the event the defendant is without funds, she should investigate with the trial court the possible appointment of counsel under the Criminal Justice Act.

APPENDIX E

TAX RULINGS
With Pocketbook Impact—

How rough will it go on an individual who deliberately fails to file his income-tax return this year? That depends partly on where he lives. In the world of taxes, justice is not always as evenhanded as it might be.

On February 13, the U.S. Court of Appeals for the Eighth Judicial Circuit offered its view of "willful" failure to file in overturning the conviction of a lawyer who had failed to file her returns for three years.

The court said her trial jury had been told that absence of "justifiable excuse" would be "sufficient to convict her," when it should have been instructed that "bad purpose and evil motive are essential elements of willfulness."

On February 24, the U.S. Court of Appeals for the Seventh Judicial Circuit ruled on the appeal of another taxpayer convicted of criminal failure to file. His defense: His trial jury had not been instructed that conviction required a showing of "bad purpose or evil motive," but had been informed that "the only bad purpose necessary for the Government to prove . . . is deliberate intention not to file."

However, this circuit court upheld his conviction, ruling that "willfulness . . . requires only knowledge of a legal obligation to file income-tax returns and an intentional failure to do so."

What it all means—

- If you live in the eighth judicial district—in Arkansas, Iowa, Missouri, Minnesota, Nebraska or the Dakotas—

Internal Revenue would have to show evil intent to get a conviction. A pure heart—or just a reasonable excuse for intentional failure to file—could get you off.

• But if you live in the neighboring seventh judicial district—in Illinois, Indiana or Wisconsin—better be prepared to prove that your failure to file was strictly unintentional.

What if you live elsewhere? People who skip filing must be prepared to take their chances.

Requests for citations to these cases should be addressed to Reader Service, 2300 N Street, N.W., Washington, D.C., 20037.

U.S. NEWS & WORLD REPORT, April 7, 1975